

**Arbitrability of Disputes arising under Security Agreements or
in Relation to Security Interests**

- **Arbitration**
 - Freely negotiated agreement to arbitrate (“Freedom of Contract”).
 - Parties agree that (possible) disputes have to be solved not by an authority of a state (state court), but by private individuals (arbitrators).
- **Exceptions to the general rule of “Freedom of Contract”.**
 - Who is able to agree on dispute resolution by arbitration? (subjective arbitrability)
 - Which matters (disputes) can be settled by arbitration? (objective arbitrability)
 - Under what conditions may a dispute be settled by arbitration?
 - **Art V (2)(a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards:** Recognition and enforcement may be refused if the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought.
 - **Art 1 (5) UNCITRAL Model Law on International Commercial Arbitration:** This ML shall not affect any domestic provisions by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this ML.
 - **Art 3 (3) UNCITRAL Model Law on Secured Transactions** explicitly states that nothing in this ML affects any agreement to use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution.
- **Restrictions on the doctrine of “freedom of rights” by national laws.**
 - The New York Convention, the ML on International Commercial Arbitration and the ML on Secured Transactions do not contain a provision on arbitrability. Consequently, we have to observe the relevant legal domestic provisions of states.
 - Dispute resolution by arbitration depends on three preconditions: subjective arbitrability, objective arbitrability and compliance with procedures.
 - **Subjective arbitrability:** Legal capacity of a party to act in legal proceedings and to conclude an arbitration agreement according to the law of the state in which the individual is a citizen or where the legal entity has its registered main office.
 - **Objective arbitrability:** This term determines the subject matters, which can be referred to arbitration. Generally, any claim involving an economic interest or in matters in which the parties are entitled to conclude a settlement are arbitrable.

In the public interest or in the interest of certain categories of persons, certain subject matters are not arbitrable or only arbitrable with limitations (e.g. corporate disputes, family matters, personal status, lease of residential accommodation).

- **Compliance with procedures:** Some disputes can only be resolved by arbitration if prerequisites are met.
For example, in Austria, Germany and Poland, disputes concerning contracts with consumers and employment contracts are only arbitrable if the arbitration agreement (i) is contained in a separate document, and (ii) was concluded after the dispute has already arisen, and (iii) a written legal advice on the relevant differences between arbitral and court proceedings was handed over.

• **Résumé**

- Art 3 (3) of the ML on Secured Transactions makes it clear that the parties to a security agreement may agree to resolve any dispute between them by arbitration, however under the condition that (i) local laws allow the use of arbitration in matters of secured transactions (objective arbitrability) and, further, (ii) the parties have the legal capacity to conclude a contract (subjective arbitrability) according to the law of the state in which the individual is a citizen or the legal entity has its registered main office, and (iii) possible legal domestic approaches (compliance with procedures) are met.
- Para 74 of the Draft Guide to Enactment of the ML on Secured Transactions expressly states that disputes about security rights under security agreements may be solved by arbitration if local law allows that. Further, it is explicitly noted in this Guide that Art 3 (3) of the ML on Secured Transactions is intended to recognize alternative dispute resolution mechanisms under the previous mentioned conditions. Disputes arising under a security agreement are arbitrable in principle, provided that the local legal system admits the subjective and objective arbitrability of such matters.

• **Right of Third Parties**

- A possible implication on third parties' rights can be never completely excluded, regardless of whether proceedings are based on a state court system or arbitration.
- In any case, the enforcement process is public and offers third persons the necessary public information, which allows them to intervene into the process.
- Entitled person has to demand the restitution of his/her good and, if necessary, file an action for restitution. In case of need, entitled person has a claim in restitution of the proceeds from the sale and possibly a claim for compensation.

• **Joinder of Third Parties**

- Proceedings at state courts foresee the possibility of intervention by third parties in support of a claimant or respondent.
- Most of well-known arbitration institutions allow also an intervention of third parties, even in a more general sense and with more options for the parties.

• **Consolidation of Proceedings**

- Consolidation of two or more arbitral proceedings is possible. It depends on the local arbitration law or the rules of the chosen arbitration institution.